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Private Practice, Public Profession: Convictions, Commitments, and the Availability of Counsel

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PRIVATE PRACTICE, PUBLIC PROFESSION: CONVICTIONS, COMMITMENTS, AND THE AVAILABILITY OF COUNSEL

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I would like to start by stating a proposition that may strike you as either simple-minded or self-evident, but, more likely, will simply seem strange because of the way in which I state it. My proposition is this: In a democratic society, the legal profession, its rights and privileges, exist to serve public purposes. The legal profession serves two principal public purposes: to provide representation to those who lack the specialized training to represent themselves, that is, non-lawyers, and to promote justice in society. One might object that representing clients is not a public purpose, but that, I would suggest, is to take too narrow a view.

Both of these purposes – the representation of clients and the advancement of justice – are public purposes. They are essential to civil peace, to the rule of law, and to the well-being of a democratic society, particularly one in which life and law are complex, and where the just resolution of disputes and the evolution of legal principle both depend upon the proper functioning of the adversary system. Of course, these two purposes will sometimes conflict, but that is a subject for another time. The point I want to make at the outset is that the legal profession does not exist principally to reward lawyers, either financially or in the sense of making them feel good. These may be ancillary benefits that flow from the practice of law, and properly may be wished for, but they do not provide its primary justification. The main justification for the legal profession rests in the fact that it satisfies the two essential social needs I have mentioned.

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Yet lawyers are neither monks nor machines. Like other professionals, we do seek psychological and spiritual satisfaction from our work, just as we seek some measure of financial well-being.[1] What I would like to do today is to explore one aspect of the relationship between these primary and secondary purposes of the legal profession: namely, the possible tension between the lawyer's personal interests and preferences and the advancement of the public purposes of the legal profession. I intend to do that by focusing on a particular issue: the availability of counsel. Indeed, what I would like to do is to focus on an issue that is even narrower than that. The question I would like to explore, albeit by a somewhat circuitous route, is this: Whether the decision to refuse representation to the repugnant client is simply a private decision, or, alternatively, one that has public dimensions.[2]

I.

Let me set the stage with two stories. One is from my own experience. The other is a story told by Jill Raitt, an Emerita Professor of Religious Studies at the University of Missouri who founded the university's Center for Religion, the Public and the Professions. My story involves the practice of law, while

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[1] *See, e.g.*, ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 107 (2001) ("Throughout discussions of work runs a basic distinction between work performed solely in order to gain a living, and work that is performed more for the pleasure or self-fulfillment it provides than for the living it yields."); ELLIOTT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT ix (1996) ("We have always known, from sociological and general literature as well as from everyday experience, that professionals and the professions act with a dual motive: to provide service and to use their knowledge for economic gain.... But what has begun to change is that professions and the work that professionals do have increasingly become the focus for actions by states, working with sectors of capitalism. For professional work can be profitable if it is organized in capitalistic forms, forms that no longer place the person who needs the service as the first priority. This trend seems to be leading to a redefinition of what professions are, from something special to just another way to make a living.").

[2] In this essay, I am principally concerned with the availability of counsel in litigated matters, both civil and criminal, and with repugnant clients who are either impecunious or will be deemed undesirable clients for other economic reasons, such as the danger that representing them may result in the shunning of a lawyer's practice by other members of the community. I also assume that repugnant clients who are economically powerful are unlikely to go unrepresented. Similarly, I am not concerned here with limning any duty to provide legal advice in a non-litigation setting, which undoubtedly involves additional considerations. Finally, I recognize that law generally operates outside of courtrooms, agencies, and lawyers' offices, and that "[c]ases which reach judges, solicitors, or administrative officials are peculiar, ambiguous, and pathological . . . instances of the abnormal functioning of law." ADAM PODGORECKI, LAW AND SOCIETY 219 (1974). As Professor Podgorecki noted, following Leon Petrazycki, such cases "reflect behavior in which the normal (usually unperceived, automatic, smooth) legal routines have failed." *Id.* It is precisely in such circumstances, of course, that the availability of counsel is critical. *See also* Roger Cotterrell, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 23-40 (1995) (discussing various approaches to the concept of "law" in sociological study of law).

Professor Raitt's story involves the medical profession. Both stories, I hope, give more detail to the tension I have described, albeit in somewhat different ways.

I'll begin with my story. During my career, I have been fortunate to work with many fine lawyers – seniors, juniors, and contemporaries. One of the senior lawyers with whom I was privileged to work was Albert E. Jenner, Jr., the long-time senior partner of my firm.[3]

Mr. Jenner was the complete lawyer. He was a courtroom lawyer and a boardroom lawyer. He had an old-fashioned belief in the public interest, and he worked tirelessly to promote it. His clients included corporations like General Dynamics, a professor who took on the House Un-American Activities Committee,[4] and men on death row.[5] All got the same attention. He was one of the lawyers President Kennedy invited to the White House to create the Lawyers' Committee for Civil Rights Under Law in 1963. He was one of the drafters of

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[3] *See, e.g., Albert E. Jenner, Jr.: In Memoriam*, 1988 U. ILL. L. REV. 817, 817-26 (1988) (Tributes by Peter Hay, James R. Thompson, William J. Bauer, Prentice H. Marshall, Thomas P. Sullivan, & Phillip W. Tone). *See also* Steven Lubet, *Professionalism Revisited*, 42 EMORY L.J. 197, 205-06 (1993). Professor Lubet has written about the dramatic effect of an appearance by Mr. Jenner in landlord-tenant court, which Professor Lubet witnessed as a legal services lawyer in Chicago in 1975:

> Legal services lawyers were seen as interlopers, people who wanted to ruin everyone else's easy time. We were tolerated, but just barely. I think that the judges considered us to occupy a position about half a step higher than the indigent defendants. These were courtrooms badly in need of reform.
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> Then one day, when I was sitting in one of the worst courtrooms waiting for my daily portion of judicial abuse, it happened. A pinstriped, downtown lawyer walked up to the bench and said, "Your Honor, I would like to present Mr. Albert Jenner." In 1975, the late Albert Jenner was probably the most well known and widely respected lawyer in Chicago. A name partner in Jenner & Block, he was most famous as the Republican counsel to the Senate Watergate Committee. Many believed that Mr. Jenner was the man most responsible for the eventual committee vote to impeach President Nixon. His visage – stern countenance, ramrod posture, piercing eyes, and signature bow tie – was well known to every Chicagoan who owned a television set. Albert Jenner was a man of unrivaled prominence, integrity, and power, and he had apparently come to the eleventh floor as a favor to a friend or employee.
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> Once Mr. Jenner's presence was announced, the entire courtroom suddenly metamorphosed. The muttering plaintiffs' bar fell silent. Clerks began answering inquiries from unrepresented defendants. The judge actually asked questions about the facts and the law. It was as though we were now in a real courtroom where justice, and people, mattered. Furthermore, this effect lasted for the entire day, long after Mr. Jenner left.

Id.

[4] *See Albert E. Jenner, Jr., supra* note 3, at 818 (Tribute by Peter Hay); ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER 299-300 (1983). *See generally* Thomas P. Sullivan, Chester T. Kamin, & Arthur M. Sussman, *The Case Against HUAC: The Stamler Litigation*, 11 HARV. C.R.-C.L. L. REV. 243 (1976).

[5] *See, e.g.*, Witherspoon v. Ill., 391 U.S. 510, 511 (1968).

the Federal Rules of Evidence. He was involved in the work of the Warren and Kerner Commissions, and he served as counsel to the House Judiciary Committee during the impeachment of President Nixon.[6] He was also a Republican Party stalwart.

One day, Mr. Jenner was asked to have lunch with a former president of the American Bar Association, who was seeking Mr. Jenner's support for some project. Mr. Jenner asked me to join them. As the day approached, however, Mr. Jenner developed a "subsequent commitment," and I was sent off to have lunch with the dignitary by myself. The gentleman obviously was unhappy about Mr. Jenner's absence, but tried to make the best of it. He was very gracious and asked me to tell him about myself. After a while, he asked whether I happened to be working on anything interesting. I replied that I was handling an important case in the Illinois Supreme Court – the direct appeal of a young man who had been convicted of killing two Chicago police officers and sentenced to death.[7] With great enthusiasm, I explained the case to him. The defendant, who could not read or write, maintained that he was tortured before he confessed, and there was compelling physical evidence to support the claim. The case was tried before the Supreme Court decided *Batson v. Kentucky*,[8] and the prosecution had produced an all-white jury by striking almost two dozen African-Americans from the venire. There was an interlocking confessions issue in the case, and the state's principal identification evidence was hypnotically induced. The young man had been convicted in the press before he was even arrested, and the mayor of Chicago had named a downtown bridge for one of the victims while the case was pending.[9] As I told my lunch partner, I thought there was a strong possibility that my client had been framed.

As I finished my statement of the case, I realized that I had not succeeded in imparting any of my enthusiasm to my host. He simply sighed, and said, "Well, I suppose someone has to represent people like that." I was deflated, to say the least, and I realized too late that I could have made a far better impression by talking about poison pills or real estate syndications.

But I was also stunned by the response. I thought that "representing people like that" was at least part of what practicing law was all about. I had been admitted eight or nine years by then, and I did not think that I was particularly naïve – or that I had lived a particularly sheltered life – but I realized that my host and I had very different ideas about what it meant to be a lawyer. My view was undoubtedly influenced by my own life experience, but I did not think

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6 *See Albert E. Jenner, Jr.*, *supra* note 3, at 817 (Tribute by Peter Hay).

7 *See* People v. Wilson, 116 Ill.2d 29 (1987).

8 476 U.S. 79 (1986).

9 *See* Dennis O'Shea, *Massive Manhunt Bags Alleged Police Slayers,* UPI, *Feb. 15, 1982;* Lynn Emmerman & Sam Smith, *Two Named in Cop Killings: Brothers are Sought; Police Find Car, Guns*, CHI. TRIB., Feb. 14, 1982, at A1 and A6; William Recktenwald & Michael Tackett, *Unserved warrant left Wilson free*, CHI. TRIB., Feb. 17, 1982, at A1 and A6; Robert Enstad, *Byrne Vows to Add 104 Cops to Force*, CHI. TRIB., Oct. 19, 1982, at A17.

that it was simply a matter of personal preference or life experience. Somewhere along the line I had been convinced by John Adams's explanation for representing Captain Preston and the British soldiers charged in the Boston Massacre trial of 1770: that "Council ought to be the very last thing that an accused Person should [go without] in a free Country."[10] Indeed, it was his representation of these British troops that Adams recalled years later as "one of the best Pieces of Service I ever rendered my Country."[11] Unlike our British brothers and sisters, we have no "cab rank" rule – requiring us to take the first client who comes along – to govern those of us who practice in the courts.[12] But the principle of availability of counsel is no less ours than theirs.[13]

Fortunately, Professor Raitt's story is shorter.[14] In Columbia, Missouri, there is a large farm that the city purchased and let go back to nature. Professor Raitt takes her dogs to run there. Sometimes, she encounters other dog owners and proceeds to cross-examine them on subjects that interest her. On one occasion, she happened to meet a young man who told her that he was a physician. He had just completed his training and was about to begin practice in another state. He also volunteered that he was a devout Christian. As their dogs ran across the reclaimed prairie, Professor Raitt, also a committed Christian, decided to do some fieldwork. She put this question to the doctor: "Suppose you have a Muslim patient who is dying, and he asks for an imam. Would you do that?" The young man's answer was brief and to the point. "I would find that offensive," he said.[15] It was his responsibility, he explained, to convert this pa-

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10 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 293 (L. H. Butterfield et al. eds. 1961). *See also* DAVID MCCULLOUGH, JOHN ADAMS 65-68 (2001); HILLER B. ZOBEL, THE BOSTON MASSACRE 220-21 (1970).

11 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 79 (L. H. Butterfield et al. eds 1961).

12 *See* ANDREW BOON & JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 27-28 (1999) (footnotes omitted) ("Neutrality is manifest in the obligation to represent any cause, irrespective of any personal feelings and the merit of that cause. It is embodied in the English bar's 'cab rank' rule; the requirement that barristers accept instructions irrespective of their personal feelings about their client or the case."). *See also* DONALD NICOLSON & JULIAN WEBB, PROFESSIONAL LEGAL ETHICS: CRITICAL INVESTIGATIONS 135 (1999) (footnote omitted) ("In theory, of course, the Bar is obliged to provide representation to all comers by virtue of the cab-rank rule. This obligation is not taken lightly by barristers, but neither is it an absolute guarantee of representation. The personal, referral, basis of the relationship between [solicitors'] firms and [barristers'] chambers means that there are informal ways in which barristers can let their preferences be known, so that they do not, on the whole, get offered work they would be likely to reject 'on principle' (if they could).").

13 Justice Jackson once made this point by noting that when rights are threatened, they are worth only "what some lawyer makes them worth." *See* Honorable Robert H. Jackson, *Tribute to Country Lawyers*, 30 A.B.A. J. 136, 138 (March 1944). "Civil liberties are those which some lawyer, respected by his neighbors, will stand up to defend." *Id.*

14 *See* Charlotte Overby, *Divine Diversity: An MU Scholar Aims to Make Room for Religion in Professional Education*, ILLUMINATION, Spring 2003, at 14-15, http://rpp.missouri.edu/images/pdf/illumination-spring03.pdf.

15 *Id.*

tient to Christianity. According to Professor Raitt, this "forthright answer" gave her pause. She thought: "Is his first duty to ensure the physical and spiritual comfort of his patient, or to his belief that as an evangelical Christian he has the right – even obligation – to evangelize a dying person who is not Christian?"[16]

Both of these stories demonstrate how deeply our personal views and preferences affect our professional conduct, either in terms of whom we decide not to serve or represent, or in terms of the way in which we carry out our professional engagements. As I reflect on the first story in particular, two things occur to me: (1) how easy it is for lawyers to think of reasons not to represent someone, particularly when the prospective client cannot pay, or when representing the prospective client could prove unpopular with clients who can pay; and (2) how little lawyers are constrained, either formally or as a practical matter, from declining to provide representation for such reasons.

Of course, there are many stories about lawyers who have taken up unpopular clients or causes, and we often point to these with pride.[17] But there are many stories to the contrary. During the McCarthy period, it was not easy to find mainstream lawyers who would take on civil liberties cases.[18] Similarly, in the decade following the Supreme Court's decision in *Brown v. Board of Education* (to say nothing of the decades that preceded that decision), white lawyers were not beating down the door to make the promise of racial equality into a reality.[19] As I mentioned earlier, that is why President Kennedy urged some of the nation's leading lawyers in private practice to establish the Lawyers' Committee in 1963.[20] These examples come from history, of course. More recently, lawyers (as well as physicians and dentists) refused to provide professional services to persons affected by AIDS.[21] Similarly, when large numbers of Arab American men were rounded up and detained in secret after the events of September 11, 2001, few lawyers initially spoke out on the issue.[22]

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16 *Id.*

17 *See, e.g.*, Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235, 1236-37 and nn. 4-9 (1996).

18 *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 254 (1976); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 630 (1985).

19 *See* Auerbach, *supra* note 18, at 264-66; Jerome E. Carlin & Jan Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 395 (1965).

20 *See* EDITH S. B. TATEL, THE LAWYERS' COMMITTEE: THE FIRST TWENTY-FIVE YEARS 5-6 (1989).

21 *See, e.g.*, Giovanni Anzalone, *AIDS and Mandatory Pro Bono: A Step Toward the Equal Administration of Justice*, 8 GEO. J. LEGAL ETHICS 691, 697 (1995); Bragdon v. Abbott, 524 U.S. 624 (1998) (dentist's denial of treatment); Cahill v. Rosa, 674 N.E.2d 274 (N.Y. 1996) (same); American Bar Association, *Report of the AIDS Coordinating Committee*, 21 U. TOL. L. REV. 19, 28-34 (1989).

22 *See* Jim Edwards, *Answering Ashcroft's Challenge: Lawyers for 9-11 Detainees Meet to Consider Coordinated Strategy*, NEW JERSEY LAW JOURNAL, Dec. 17, 2001 ("addressing criticism from civil rights groups about the detention of 548 Muslim men on minor immigration violations

Today, some lawyers assert that they should be exempt from anti-discrimination legislation.[23] According to this view, lawyers should be able to reject a client for any reason or no reason at all, without regard to whether their reasons are discriminatory, and without regard to whether the potential client will likely be able to obtain legal representation elsewhere. These objections to representation sometimes rest on specifically religious grounds, as when some Christian lawyers assert that they should not be required to represent clients whose causes or characters they find objectionable.[24] These objections may also be based on racial animus or on some other form of invidious discrimination.[25]

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since Sept. 11, Attorney General John Ashcroft told a press conference: 'I have yet to be informed of a single lawsuit filed against the government charging a violation of someone's civil rights as a result of this investigation . . . . [H]is words . . . formed a challenge to lawyers who have so far done little more than offer piecemeal defenses for clients within the limited arena of the immigration courts."); Adam Miller, *Legal Dilemma: South Florida Lawyers Worry their Clients with Arab Surnames won't be able to get a Fair Trial for a Long Time to Come*, BROWARD DAILY BUSINESS REVIEW, Sept. 18, 2001, at A1; Elizabeth Amon, *Name withheld: harsh justice for a September 11 detainee*, HARPER'S MAGAZINE, Aug. 1, 2003, at 56 ("In its investigation of the September 11 attacks, the U.S. government rounded up hundreds of Middle Eastern, South Asian, and Muslim immigrants . . . . In general, only one detained immigrant in five obtains a lawyer . . . . Many of the detainees had no attorney, and the lists of free attorneys at the jails were invariably outdated or incorrect. At the Brooklyn MDC, not a single number on the list was a working number for an attorney willing to take on cases."). *See also* Neil A. Lewis, *Rising Tide of Lawyers at Guantanamo Bay*, N.Y. TIMES, June 3, 2005, at A1 ("'In the beginning, just after 9/11, we couldn't get anybody,' said Michael Ratner, president of the Center for Constitutional Rights, a group based in New York that is coordinating the assigning lawyers to prisoners. The earliest volunteers, Ratner said, were those who regularly handled death-penalty clients and were accustomed to representing the reviled in near-hopeless cases.").

[23] *See, e.g.*, Charles W. Wolfram, *Selecting Clients: Are You Free to Choose?*, TRIAL, Jan. 1998, at 20 (arguing that a woman lawyer should be allowed to represent only women in divorce proceedings, notwithstanding Massachusetts anti-discrimination law); Joan Mahoney, *Using Gender as a Basis of Client Selection: A Feminist Perspective*, 20 W. NEW ENG. L. REV. 79 (1998) (arguing that woman lawyer should be allowed to choose clients by gender as a particular form of specialization). *See also* Stropnicky v. Nathanson, No. 91-BPA-0061, (Mass. Comm'n Against Discrimination Feb. 25, 1997); Nathanson v. Commonwealth of Mass. Comm'n Against Discrimination, 16 Mass. L. Rep. 761 (Mass. Super. 2003) (holding that woman lawyer could not legitimately refuse to represent men); Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 96-F-140 (1996) (denying lawyer right to decline appointment to represent minor seeking abortion based on moral and religious objections).

[24] *See* Jennifer Tetenbaum Miller, *Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?*, 13 GEO. J. LEGAL ETHICS 161, 164 (1999) (discussing "why the religious lawyer should be able to make client selection decisions based on faith").

[25] *See* W. William Hodes, *Accepting and Rejecting Clients--The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 U. KAN. L. REV. 977, 988-89 (2000) ("Professor Alan Dershowitz and I, both Jewish, have also consulted on the case, and have been outspoken in our opposition to the governmental witch-hunt against [Matthew] Hale. And I, at least, have criticized the moral cowardice of private lawyers who brush away the obvious First Amendment implications of the case in the name of political correctness and 'professionalism,' such as the Illinois State Bar Association, which attempted to file an *amicus* brief in the Illinois Supreme Court opposing Hale's [bar] admission."); Nadine Strossen, *Incitement to Hatred: Should There Be a*

They may also be based on the view that a lawyer has absolute discretion to decide whom she wishes to represent, and is absolutely entitled to refrain from providing representation to whomever she wishes, even if her reasons would be unlawful in other circumstances. On this view, the lawyer-client relationship is an intimate relationship, which must be based on mutual respect and trust, and that respect and trust cannot be mandated. If a lawyer harbors animosity toward some class of persons to which a putative client belongs, or wishes not to represent that person for some other reason, a productive professional relationship cannot be formed, and there is nothing that the law can do to change that fact.[26]

There may be situations in which individual lawyers should be excused from undertaking a particular representation. But it is important to recognize that such circumstances should constitute the exception to the rule, not the rule itself. To hold otherwise is to pay insufficient attention to the public purposes that justify the existence of the profession itself.

II.

What does it mean to be a lawyer? Like most things in life, the lawyer's role cannot be defined or described by reference to a single characteristic or purpose. In our system of law and government, the lawyer's role encompasses several elements, each of which is essential, but not necessarily congruent with the others. These elements are always in tension, and the tension always in danger of collapse. In one sense, the fundamental moral challenge of lawyering is to maintain that tension, while also according to each of these elements the weight it properly deserves.

We can see this tension in some of the texts that define the lawyer's role and describe the lawyer's responsibilities. Thus, the first sentence of the Preamble to the Model Rules of Professional Conduct alludes to this complexity by pointing to three separate aspects of the lawyer's role: "A lawyer . . . is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."[27] There are three things about this tripartite statement of the lawyer's role that interest me. First, the Preamble speaks in much loftier terms than any of the specific rules that follow, and it speaks much more directly than those specific rules do about the broadly public

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Limit?, 25 S. ILL. U. L.J. 243, 244 (2001) (arguing that First Amendment prohibits state officials from discriminating against persons who express racist views).

[26] *See* Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9, 9 (1998) (disapproving discrimination, but arguing that "[l]awyers should be permitted to reject clients on the basis of sex, race, religion, national origin and sexual orientation, that is, on grounds which law and morality require be prohibited as selection criteria in virtually every other area of life."). *See also* Wolfram, *Selecting Clients*, *supra* note 23 (arguing that "[u]nder the professional codes, any lawyer may refuse to represent any client for good reasons, for bad reasons, or for no reasons").

[27] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (2004). [hereinafter MODEL RULES].

aspects of the lawyer's role. Second, the statement identifies three specific elements of the lawyer's role, but only one of these elements focuses directly on client representation. The other two elements speak to the lawyer's responsibilities to the public, either to the courts or to society in general. Third, and equally important, the first sentence of the Preamble divides the lawyer's role into three parts, and into only three parts. It does not speak to a fourth aspect of the lawyer's role, to which I have previously alluded: the lawyer's personal interests and commitments. These may be described broadly, to include a variety of considerations and preferences that flow from the lawyer's duties to herself and the values she personally affirms, as well as the duties she owes to the various communities to which she belongs, and to the individuals who depend on her in one way or another, such as her family, her professional colleagues, and her employees. For want of a better term, we can refer to this fourth element as the lawyer's self-regard or self-realization interest.[28]

This omission of the lawyer's self-realization interest is both understandable and difficult to comprehend. From a practical perspective, it might seem difficult to articulate this element with the kind of succinctness that characterizes the statement of the three elements mentioned in the first sentence of the Preamble, and it would also seem difficult to provide the kind of short elaboration that the Preamble subsequently provides for those elements. But one also suspects that the drafters may have thought there was something vaguely improper about giving the lawyer's self-realization interest the degree of prominence that placement in the first sentence, as a fourth element of the lawyer's role, necessarily would betoken. While the Model Rules are not meant to be an entirely closed system, they do lay claim to a degree of objectivity and professional self-abnegation that might be embarrassed by giving such prominence to the lawyer's personal values and commitments. On the other hand, ignoring the fundamental importance of these personal obligations and preferences seems like attempting to ignore the presence of a large gorilla in a small space.

A later paragraph of the Preamble does state that "conflicting responsibilities are encountered" in the practice of law, and that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."[29] The Preamble further recognizes that resolving such problems within the framework of the Rules may present "difficult issues of professional discretion" requiring "the exercise of sensitive professional and moral judgment guided by the basic principles underlying the

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[28] *See* Barry Sullivan, *Naked Fitzies and Iron Cages: Individual Values, Professional Virtues, and the Struggle for Public Space*, 78 TUL. L. REV. 1687 (2004); Barry Sullivan, *The Problem and Possibilities of Professionalism*, 21 DUB. U. L.J. 108 (1999). *See generally* Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117 (2001).

[29] MODEL RULES, *supra* note 27, Preamble.

Rules."[30] Obviously, this language does address the idea of the lawyer's self-interest or self-realization, but it does so somewhat obliquely, and with a content arguably less textured than that to which I have previously alluded. After all, one could give a relatively narrow construction to the idea of "remaining an ethical person while earning a satisfactory living." In this sense, the phrase could be used simply to acknowledge the lawyer's fiduciary obligations – a definitional characteristic shared by all the professions – rather than making any statement about the special force or relevance of the lawyer's web of personal convictions and commitments, let alone about the degree to which the lawyer's work intrinsically and necessarily involves adherence to both technical standards and "behavioral and social norms, or morality," as recognized by Rule 2.1.[31] In this sense, the lawyer's gorilla is not only large, but unlikely to leave the room.

But let us move on from the Preamble. What specific Rules are relevant, and what do they say about the making of individual decisions that implicate the availability of counsel or the lawyer's duty to provide counsel to those in need of assistance? To start with, the Rules are fairly specific in identifying the circumstances in which lawyers are prohibited from representing a prospective client, either absolutely or conditionally, as in various conflict situations. On the other hand, the Rules do not categorically require that a lawyer ever accept a professional engagement. The most relevant rules are Rules 6.1 and 6.2, but even these Rules have relatively little to say on the subject.[32]

Rule 6.1 simply affirms the hope that lawyers will provide pro bono services. According to Rule 6.1, "A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year," and a "substantial majority" of this time should be allocated to representing, without a fee, "persons of limited means" or organizations engaged in matters "which are designed primarily to address the needs of [such] persons."[33] This is the principal way in which this aspirational goal is to be met. To the extent that the goal is not met in this way, lawyers may provide services without fee or at substantially reduced fee in matters involving civil rights and civil liberties, and in matters involving charitable, civic, and other not-for-profit organizations; deliver legal services at substantially reduced fee to persons of limited means; and participate in activities to improve the law, the legal system, and the legal profession.[34] The Rule is only aspirational, and its principal focus is relief of the poor. Protecting civil liberties and civil rights, and reforming the legal system, are decidedly inferior objectives in this hierarchy.

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30 *Id.*

31 MODEL RULES R. 2.1.

32 MODEL RULES R. 6.1 and R. 6.2.

33 MODEL RULES R. 6.1(a).

34 MODEL RULES R. 6.1(b).

Rule 6.2 deals with court appointments, and, unlike Rule 6.1, Rule 6.2 is at least formally mandatory. This Rule provides that "[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause."[35] The Rule then lists three examples of "good cause." First, good cause exists when undertaking the representation is likely to result in a violation of law or the Rules.[36] Second, good cause exists when accepting the appointment is likely to entail an unreasonable financial burden.[37] Third, good cause exists when "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."[38] The comment to the Rule is instructive. It begins, not by focusing on the lawyer's obligation to accept an appointment, but by emphasizing the lawyer's discretion to refuse representation to a client or cause she finds repugnant:

> A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service . . . . An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.[39]

Much has been made of the fact that the Model Code previously viewed the lawyer's obligation to accept appointments as merely an ethical responsibility,[40] whereas the Model Rules treat it as an enforceable obligation theoretically subject to discipline. To underscore the seriousness of this change, critics often point to a small number of cases in which disciplinary or other officials have taken the position that a lawyer should be subject to professional discipline or other penalties for refusing to represent someone whose cause or character she found morally objectionable.[41] These cases are intellectually interesting, but my hunch is that they are not particularly representative. After all, it is a relatively rare case in which a judge asks a lawyer to accept an appointment, and a still rarer case in which the cause or client will be deemed repugnant. Moreover, most judges are likely to credit a lawyer's statement that she cannot accept a

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35 MODEL RULES R. 6.2.

36 MODEL RULES R. 6.2(a).

37 MODEL RULES R. 6.2(b).

38 MODEL RULES R. 6.2(c).

39 MODEL RULES R. 6.2 cmt. 1.

40 *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE].

41 *See, e.g.*, Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 96-F-140 (1996).

particular appointment in good conscience. As a practical matter, I doubt that lawyers are often coerced into acting for clients or in causes they find repugnant. The discretion to decline an appointment, while admittedly not absolute, is substantial.

There is a second point with respect to the differences between the Model Code and the Model Rules that also bears emphasis. While it is true that the Model Code did not recognize the obligation to accept a court appointment as an enforceable duty subject to discipline, it is also the case that the Model Code's statement of non-enforceable ethical considerations contained a more forceful statement of the lawyer's obligation to provide representation in general, and to disfavored clients and causes in particular. EC 2-26 acknowledges that a lawyer has no obligation to provide representation to everyone who wishes to become her client, but admonishes that, "in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment."[42] In addition, EC 2-27 provides that "[r]egardless of his personal feelings, a lawyer should not decline representation because a client or cause is unpopular or community reaction is adverse."[43] On the other hand, EC 2-30 cautions that an engagement should be declined "if the intensity of [the lawyer's] feeling . . . may impair [the client's] effective representation."[44]

III.

In 1983, Charles Wolfram, one of the leading scholars in legal ethics, published an important essay on the nature and extent of the lawyer's duty to represent a repugnant client.[45] First, Professor Wolfram considered whether lawyers have any enforceable legal duty to provide representation.[46] He concluded that the then-new Model Rules did little to qualify the lawyer's general freedom to choose her clients. Professor Wolfram wrote:

> [U]nder the new Model Rules as under the existing code, it appears that a lawyer has professional discretion to accept or reject any case, except for an appointed case. In fact, unlike the code in EC 2-26, the Model Rules and commentary do not suggest that a lawyer in a nonappointment situation must have a

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42 MODEL CODE EC 2-26 (1980).

43 MODEL CODE EC 2-27 (1980).

44 MODEL CODE EC 2-30 (1980).

45 Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 214 (David Luban ed., 1983).

46 *Id.* at 215 ("The untutored instinct is that the representation of any such [repugnant] client should, at most, be left to the discretion of the lawyer left to undertake it. On closer examination, however, . . . [there arises] a substantial doubt that a lawyer never is obliged to accept a case of a repugnant client.").

> reason at all, good or bad, to decline a representation. And there is no requirement that a lawyer represent a repugnant client, in a nonappointment setting, even if the lawyer's feelings would not prevent an adequate relationship and representation.[47]

But that does not end the inquiry. As Professor Wolfram noted, "a lawyer of normal moral instincts will not lead a professional life impelled only by the direct and sanctionable commands of professional regulations."[48] In the absence of an enforceable legal duty to represent, two questions remain: Is there ever a moral duty to provide representation? If so, does it ever extend to the representation of a client whose character or cause the lawyer finds repugnant?

In pursuing these two questions, Professor Wolfram finds a useful analogy in the moral duty to rescue.[49] That duty is not unqualified, of course, but depends on a number of factors, including the capacity of the rescuer, the extent of the danger facing the party in need of rescue, the risk presented to the rescuer and others, and the degree to which the particular rescuer's efforts are uniquely required by the party in need of rescue.[50] In some circumstances, the moral case for rescue will be compelling, as when an adult can save the life of a drowning child simply by throwing him a readily available rope.[51] In other circumstances, the weight of other factors, such as the possible danger to the rescuer or others, may lead to a different result.

Professor Wolfram uses these factors to frame his inquiry into the nature and extent of the lawyer's moral responsibility to provide representation. First, the lawyer can have no duty to assist unless he is "competent," in the sense of having relevant professional knowledge.[52] Second, risks to the lawyer and third parties properly may be considered because "[t]he duty to rescue

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47 *Id.* at 218.

48 *Id.*

49 Professor Wolfram is interested here in the "moral duty to rescue," rather than the "legal duty to rescue." He notes:

> In law, courts in the United States and in other common-law countries generally have rejected a duty to rescue a person in peril unless there exists one of a relatively narrowly defined kind of special pre-existing relationships. But the reasons given for rejecting a general legal duty to rescue have nothing to do with morality. Instead, they are based on a tradition in the common law to find liability only where affirmative acts have caused injury and, more important perhaps, on apprehensions about difficulties in administering a legal duty to rescue. But while denying that the potential rescuer who fails to act may be held liable in damages, judges have left little doubt that they regard the unmoved spectator as a moral derelict.

Id. at 218 (footnotes omitted).

50 *Id.* at 219.

51 *Id.* at 218-19.

52 *Id.* at 219-20.

[may] be overridden by other compelling duties, loyalties, or interests."[53] In the lawyer's case, these may include competing professional, family, or personal needs, and the absence of any obligation to incur significant financial sacrifice.[54] Third, the existence of a duty to rescue depends on the "necessitousness" of the person in need of rescue, that is, "on [the existence of] a high likelihood of a significant danger to the victim whose rescue uniquely requires the rescuer's labors."[55] Thus, in the legal context, there can be no duty to represent unless the client is "in danger of losing a significant legal interest specifically because of the absence of *this* lawyer's legal assistance."[56]

Based on this analogy, Professor Wolfram concludes that the moral duty to provide representation is "not an inconsiderable one."[57] After all, given the complexity of the legal system and the bar's monopoly on representation, the withholding of needed legal assistance may mean that "prospective clients will not obtain what the law otherwise would have allowed."[58] From a moral, as opposed to a legal viewpoint, the lawyer is not absolutely free to withhold representation.

In the special case of the repugnant client, Professor Wolfram suggests that a more demanding version of the rescue test may be appropriate. Before we turn to the "rescue with bite" analysis, let me raise two preliminary questions: Who is the "repugnant" client, and how do we know how to identify her? As Professor Wolfram notes, this is a critical question if "a [proper] balance [is to be struck] between the intellectual and moral freedom of a lawyer and the legal needs of a repugnant client[.]"[59] If "repugnance" of client or cause is to be decisive in extending or withholding the privilege of representation, we must know what it means. But this is a question, as Professor Wolfram also notes, that requires "more elaboration than it has . . . received."[60] Of course, a client may be deemed repugnant because of her poor character, her ideological commitments, or both. But what counts for bad character or bad ideological commitments? Moreover, there are many degrees of disapproval. As Professor Wolfram is

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53 *Id.* at 220.

54 Professor Wolfram notes:

> One with a sensible set of moral values would hesitate a long time before foisting extreme heroism upon ordinary moral agents. A desire not to ruin one's private practice or one's organization, not to impair seriously the extent to which one can make credible arguments in behalf of other clients, not to bring scorn upon one's family and friends – these and similar concerns are legitimately compelling.

Id. at 225.

55 *Id.* at 221.

56 *Id.* (emphasis in original).

57 *Id.* at 223.

58 *Id.*

59 *Id.* at 225.

60 *Id.*

careful to specify, it cannot be that "all possible reasons for differing from another person can count as grounds for 'repugnance.'"[61] "Some reasons would have to be rejected as trifling or as overly judgmental reactions of a senselessly severe moral, political, or aesthetic prudery," and some would "demonstrate a failure of ethical judgment, not an abundance of it."[62]

Professor Wolfram gives a number of examples in which the "repugnance" of the potential client is deemed to be self-evident: the Nazi, the remorseless murderer, or the grasping entrepreneur who makes "Saturday Night Specials."[63] But "repugnance" will not always be self-evident. Who is to decide those cases, and by what standard? Let us leave that question for a moment and return to Professor Wolfram's "rescue with bite" analysis.

Several of the rescue analysis factors require additional elaboration. First, a lawyer may claim to lack "competence" because her personal feelings of revulsion may impede her ability to advocate.[64] In Professor Wolfram's view, this claim should be taken seriously, but such "flawed" representation still may be better than none, and may even be morally required if the other criteria are met, and if the client is made aware of the lawyer's personal feelings.[65] Indeed, it was just this sort of representation that John Adams provided to Captain Preston.[66] Second, the possibility of risk to the rescuer and others requires special consideration here. A lawyer properly may consider the constriction of her personal autonomy, as well as other harms that representing a repugnant client may cause her, her family, and her other clients.[67] Third, Professor Wolfram believes that "necessitousness" does not take its meaning in this context from the existence of legal rights, but only from "the sort of human need that vindication of the legal right will fulfill in the particular case."[68] Finally, and most important, Professor Wolfram believes that there can be no duty to represent unless the lawyer is persuaded that the repugnant client's claim is morally important and compelling.[69] In this view, there may be circumstances in which there may be a moral duty to represent a necessitous, but repugnant client, but those circumstances will be relatively few, and the duty to represent will depend on the lawyer's evaluation of the rescue factors, including his assessment of the moral character of the client's claim.

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61 *Id.* at 226.

62 *Id.*

63 *Id.* at 225-27.

64 *Id.* at 224.

65 *Id.*

66 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 10, at 293. When Adams agreed to represent Captain Preston, he specified that: "[h]e must ... expect from me no Art or Address, No Sophistry or Prevarication in such a Cause; nor any thing more than Fact, Evidence and Law would justify." *Id.* Captain Preston agreed to these terms. *Id.*

67 Wolfram, *supra* note 45, at 225.

68 *Id.* at 230.

69 *Id.* at 223 and 229.

Under this view, as Professor Wolfram acknowledges, valuable legal rights may be lost, simply because no lawyer is willing to provide counsel. This result may "not rest entirely comfortably on the mind,"[70] but it is morally defensible, according to Professor Wolfram, because each lawyer is morally entitled to act as he sees fit.[71] Any moral obligation to provide counsel to protect valuable rights is not the obligation of any individual lawyer. If this duty were owed by anyone, it would be owed by the legal system in general.[72] But even that is not the case because society has not seen fit to recognize it as a matter of law. Thus, Professor Wolfram would not find it unjust even if all the lawyers in a community were to withhold representation from a particular client, based on moral grounds. When all lawyers refuse to assist a repugnant client in exercising his First Amendment rights, for example, "[t]he resulting 'lawyers' trump' replaces official judgments and policies with private moral ones."[73] But that result is justifiable, according to Professor Wolfram, because "the 'lawyers' trump' objection is . . . addressed more to reasons why a society might decide to enact laws requiring lawyers to represent even repugnant clients, or some of them in some situations."[74] It does not speak to an individual lawyer's moral obligations, which, for Professor Wolfram, provides the litmus test. Professor Wolfram concludes:

> We have assumed from the beginning that certain deeply held feelings of repugnance – toward Nazis, murderers, grasping entrepreneurs, and others – are entirely defensible on moral grounds. If uniformity in moral judgments produces a de facto kind of extralegal social control, so long as the 'shunning' is not itself unlawful, then it would seem that it is morally justified.[75]

From this discussion, it seems clear that Professor Wolfram's view is premised upon a sharp demarcation between the public and the private spheres, between the realms of legal obligation and individual moral choice. There is no place in this view for discussions of "professional morality" except insofar as principles of professional morality have been enacted as positive law or enforceable disciplinary rules. It is for this reason that Professor Wolfram can assert that, "there should be no moral imperative to act in a particular way solely for the reason that other moral agents might act immorally in the same circum-

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70 *Id.* at 231-32.

71 *Id.* at 232.

72 *Id.* at 227.

73 *Id.* at 232.

74 *Id.*

75 *Id.* at 233.

stances."[76] Thus, these are issues to be decided according to moral philosophy, which is "all about individual states of mind, about subjective knowledge, intentions, and wishes."[77]

IV.

The analysis set forth in Professor Wolfram's 1983 essay is useful, but ultimately, I think, unsatisfying. It seems to me that Professor Wolfram provides an entirely private solution to a problem that is at least partially a public problem. The analysis fails, at several points and in different ways, to pay sufficient attention to the public character of the legal profession, to the place of professional values in the making of individual and collective decisions by lawyers, and to the public interest in the availability of counsel. In the case of the repugnant client, the lawyer is asked to consider a number of factors in deciding whether to extend or withhold representation, but the goals of the legal system and the lawyer's role in that system are not among them.

Where does the analysis go wrong? One might begin with the choice of the duty to rescue doctrine as an analytical template. This is a moral doctrine meant to describe the moral obligations of people who are strangers, that is, potential rescuers who have no personal relationship to the parties in need of rescue and no professional obligations that might inform their decision-making. But what could be a morally acceptable response on the part of a stranger might well come up short if it were the response of the endangered party's father or mother, on the one hand, or of a police officer or firefighter, on the other. It is critical for Professor Wolfram to insist that a lawyer, in the absence of a lawyer-client relationship, is nothing but a stranger to the party needing legal assistance, entitled to approach the decision about representation from a purely private moral perspective, and that the values of the legal profession have no claim to consideration in that process. But that assumes that the status of being a lawyer, and having the privilege of practicing law, entails no special responsibilities absent the existence of a specific professional engagement. In terms of a legally enforceable duty, that may be correct. But surely the lawyer has moral obligations that are specific to the status of being a lawyer. In addition to having the moral obligations that guide strangers in dealing with each other, the lawyer has moral obligations that flow from her status as a "public citizen having special responsibility for the quality of justice."[78]

Ironically, Professor Wolfram refers at a couple of points in the essay to the duties or expectations of a "lawyer of normal moral instincts," but the essay contains no elaboration or explanation of this phrase. Professor Wolfram does not say what he means by the phrase, and he gives no reason to believe that the

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76 *Id.* at 232.

77 *Id.*

78 MODEL RULES, *supra* note 27, Preamble.

choice of the word "lawyer," as opposed to the word "person," was deliberate. Indeed, the overall context of Professor Wolfram's analysis, with its careful attempt at segregating legal, moral, and political values, strongly suggests that professional values have no place in the moral inquiry he posits. What is moral belongs to the realm of the private; what does not belong to the private is obligatory only because of positive law. In his view, moral philosophy is not related to the ends of institutions, such as the professions, but is "simply about individual states of mind, about subjective knowledge, intentions and wishes."[79]

I believe that this approach is fundamentally flawed. When one becomes a lawyer, one necessarily accepts certain fundamental values of the profession, not all of which are set down in positive law or disciplinary rules. These values do not necessarily trump values that originate in other sources, but they are values that must be considered, and considered seriously, when someone who is a lawyer engages in decisions relating to her role as a lawyer. They are to be considered, along with other claims, within the process of serious and thoughtful introspection that these decisions require, and they must be given the weight that they deserve.

A second difficulty with Professor Wolfram's approach -- one also related to the insufficient attention he gives to the public character of the legal profession -- involves the central issue of defining "repugnance." As we have seen, serious public consequences flow from being deemed "repugnant" by the lawyer. To make even a moral claim to legal representation, a repugnant client must do more than simply show a serious threat to an important legal right. In Professor Wolfram's view, she must demonstrate the existence of a compelling moral claim, not simply involving a significant legal right, but involving an important human need. Whether that test is met in a particular set of circumstances is a question for the individual lawyer to decide, according to individual moral values, which may also reflect the prevailing values of the community in which the lawyer works. Thus, whether issues involving First Amendment rights will ultimately be presented to the courts may depend on the lawyer's evaluation and sympathy for the speaker's moral claim. If all lawyers in the community hold the same view – that Communists should not be allowed to speak, or that information about contraception ought not to be available – representation will be unavailable, and such discordant voices effectively will be silenced.

What properly may count as repugnance? In some cases, such as certain claims advanced by Nazis, "repugnance" may be self-evident, as Professor Wolfram suggests.[80] In many cases, however, the question will not be so easy. But Professor Wolfram has little guidance to offer, apart from the very sensible observation that "not all possible reasons for differing from another person can be counted as grounds for 'repugnance,'" and that "[s]ome reasons would have

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79 Wolfram, *supra* note 45, at 232.

80 *Id.* at 225.

to be rejected as trifling or as overly judgmental reactions of a senselessly severe . . . prudery."[81] Perhaps he means to suggest that "we'll know it when we see it," or that this is a question that can be resolved by reference to shared experience and values. In other words, decisions about repugnance may be made according to a kind of "reasonable person" standard, to which most of us would assent. If that is the suggestion, I have serious reservations about the current existence of such a consensus.

In the years since Professor Wolfram addressed the question of the repugnant client, professional responsibility scholars have paid a great deal of attention to what I have called the self-realization aspect of the lawyer's role. Building upon evidence of lawyer dissatisfaction, and recognizing the ultimate futility of attempting to compartmentalize personal and professional lives, these scholars have called attention to the need for lawyers to attend to their own values. The worthy aim of this project has been to enrich the emotional and moral lives of lawyers, and much emphasis has been placed on identifying the conditions necessary for lawyers to lead fulfilling lives. Much of this literature recognizes the essential complexity of the lawyer's role and addresses these issues with appropriate care and circumspection.[82] But like Laertes, lawyers sometimes are admonished simply to be true to themselves in all that they do,[83] without sufficient attention being paid to the inescapable complexity of their situations.

Not surprisingly, an important part of this literature has approached these issues from the viewpoints of various religious traditions. Scholars writing in this vein have usefully explored the ways in which the commitments of particular religious traditions may enrich professional lives and practice,[84] as

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81 *Id.* at 226.

82 Thomas Morawetz has written with great insight and elegance about these issues. *See, e.g.*, Thomas Morawetz, *Lawyers and Introspection*, in 2 LAW AND LITERATURE: CURRENT LEGAL ISSUES 355, 371-72 (Michael Freeman & Andrew D.E. Lewis eds., 1999).

83 WILLIAM SHAKESPEARE, HAMLET act I, sc. iii. ("This above all – to thine own self be true,/ And it must follow, as the night the day,/ Thou canst not then be false to any man."). *See also* CHARLES TAYLOR, VARIETIES OF RELIGION TODAY: WILLIAM JAMES REVISITED 80 (2002) ("The 1960s provide perhaps the hinge moment, at least symbolically. It is on one hand an individuating revolution, which may sound strange, because our modern age was already based on a certain individualism. But this has shifted on to a new axis, without deserting the others. As well as moral/spiritual, and instrumental individualisms, we now have a widespread 'expressive' individualism. This is, of course, not totally new. Expressivism was the invention of the Romantic period in the late eighteenth century. Intellectual and artistic élites searched for the authentic way of living or expressing themselves throughout the nineteenth century. What is new is that this kind of self-orientation seems to have become a mass phenomenon.").

84 Cathleen Kaveny has written an exceptionally thoughtful and compelling essay on these themes. *See* M. Cathleen Kaveny, *Billable Hours in Ordinary Time: A Theological Critique of the Instrumentalization of Time in Professional Life*, 33 LOY. U. CHI. L.J. 173 (2001). *See also* James L. Nolan, *To Engage in Civil Practice as a Religious Lawyer*, 26 FORDHAM URB. L.J. 1111 (1999); Amelia J. Uelmen, *Can a Religious Person Be a Big Firm Litigator?*, 26 FORDHAM URB. L.J. 1069 (1999).

well as the limits that various religious traditions arguably place on the types of professional engagements or clients that an adherent properly may undertake. For example, many Christian legal scholars hold that a Christian lawyer would commit a grievous sin by accepting a court appointment to represent a woman seeking an abortion.[85] For some, the same would be true with respect to representing a seller or distributor of condoms, the parties to a divorce, or an unmarried couple living together.[86] Others presumably would hold that gay and les-

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[85] *See, e.g.*, Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 660-65 (1997). Professor Collett writes:

> Simply refusing to obtain or perform an abortion is not sufficient for the conscientious member of the Roman Catholic Church. The duty to avoid evil prohibits both personal performance of evil acts and intentional cooperation with such acts. Therefore, the Church teaches that a Catholic cannot "take part in a propaganda campaign in favor of such a law [legalizing procured abortions], or vote for it. Moreover, he may not collaborate in its application."

Id. at 664 (footnotes and citations omitted).

Thus, according to Professor Collett, "By accepting the court appointment in judicial bypass proceedings, the lawyer would be agreeing to publicly defend the act of abortion and to make that act possible through obtaining a court order authorizing the procedure. Every conscientious Catholic lawyer must refuse such appointment to be faithful to God and Church teaching." *Id.* at 665 (footnote omitted). *See also* Robert P. George, *Reflections on the Ethics of Representing Clients Whose Aims are Unjust*, 40 S. TEX. L. REV. 55 (1999).

[86] Some Christian lawyers undoubtedly would agree with Joseph Allegretti that representation of the parties to a divorce case provides an opportunity for living fully as a lawyer and a Christian, providing compassionate understanding as well as competent legal service. *See* JOSEPH G. ALLEGRETTI, THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE 47 (1996) ("A lawyer in a divorce action may find himself listening to his client tell stories of abuse and betrayal. What is called for is not only competent legal service, although that is always demanded, but a compassionate heart as well."). In January 2002, however, Pope John Paul II reportedly declared that Roman Catholic lawyers "must refuse to take divorce cases, and should instead try to help separated couples reconcile." Melinda Henneberger, *John Paul Says Catholic Bar Must Refuse Divorce Cases*, N.Y. TIMES, January 29, 2002, at A1.

John Noonan has discussed the difficulty of reconciling Pope John Paul II's expressed views on this subject with the Church's actual practices during his pontificate. *See* JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE 177 (2005) ("John Paul II, who is untiring in his insistence on the indissolubility of marriage, appears as a principal in its dissolution."). *See also id.* at 178-90. On a more general level, Judge Noonan has demonstrated that those who believe that the moral teaching of the Catholic church is fixed and unchanging are simply mistaken. As Cardinal Newman demonstrated with respect to matters of doctrine, *see generally* JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (1974), http://www.newmanreader.org/works/development, Judge Noonan demonstrates with respect to moral theology. Moral principle is fixed at one level, but is also subject to unceasing development. Judge Noonan writes:

> The intrinsic is not a talisman in morals. What was perceived as intrinsically evil in making money out of money was dissolved by introducing titles that extrinsically justified profit. What was intrinsically evil in divorce was removed by the invocation of extrinsic authority. Contrariwise, slavery was extrinsically justified by property titles but came to be seen as intrinsically of-

bian people should not be represented, either categorically or with respect to certain matters. Others would hold that lawyers should not represent people of other faiths, or people adhering to faiths that they find abhorrent for one reason or another. Some doubtless would say that it is sinful to sue the church in a civil court. For purposes of simplicity, I have talked about certain Christian perspectives, but I could make similar points with respect to other religious traditions whose adherents have contributed to this literature. I could also make similar points about strongly held positions that are not conventionally identified with religion. I have focused on religion-based examples for two reasons. First, the literature justifying the withholding of representation on religious grounds is extensive. Second, the idea of mortal sin or eternal damnation is a powerful trump. There is little need for introspection or moral analysis if the religious lawyer takes the view that a particular representation is prohibited on non-negotiable religious grounds, and that no possible moral claim arising from one's status as a lawyer could possibly alter that outcome.

More generally, it seems to me that the price of "repugnance" in society has plummeted. "Repugnance" is cheap. We live in a time and place where there are deep divisions on important questions about how each of us, and all of us, should live our lives. Many believe that a genuine commitment to individual freedom is essential to the peace of a pluralist society, while others believe that a greater degree of conformity in thought and action is the key to civil peace.[87]

> fensive to human dignity. What was once seen as self-evidently or intrinsically absurd, that error should have rights, was bypassed once it was seen that rights belong to persons; it is now, in the words of John Paul II, "intrinsically evil" to "coerce rational minds."

Noonan, *supra*, at 211. *But see Contradictions in Teaching on Religious Freedom?* (June 30, 2005) http://www.catholic.net/global_catholic_newsemplate_news. phtml?chanel_id=2& news_id=7346 (reporting Cardinal Renato Martino's assertion that the position of the church has not been inconsistent with respect to religious freedom, but that "truth and error are not on the same level").

[87] In FEDERALIST 10, Madison observed that there are "two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests." THE FEDERALIST NO. 10, at 58 (Jacob E. Cooke, ed. 1961). With respect to the first method. Madison wrote:

> It could never be more truly said than of the first remedy, that it was worse that the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

Id. With respect to the second method, Madison wrote:

> The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter

There are similar disagreements on a broad range of other important issues, and there are deep divisions, of course, on much less important questions. Not only do we disagree, we deplore the wrong-headed ideas of those who disagree with us. We do not speak metaphorically when we say that we find them and their ideas "repugnant." Indeed, in this respect, I am reminded of the words of the song made popular by the Kingston Trio in the late 1950s:

> [T]he whole world is festering with unhappy souls. The French hate the Germans, the Germans hate the Poles, Italians hate Yugoslavs, South Africans hate the Dutch, AND I DON'T LIKE ANYBODY VERY MUCH![88]

Of course, the cheapening of the idea of "repugnance" in society generally has important ramifications for the legal profession in particular. To paraphrase Tocqueville, the kinds of questions about which we violently disagree are precisely the kinds of questions that are likely to be brought to the courts in our version of democratic government.[89] As lawyers, we are obliged to assist the courts in resolving these questions in a way that promotes public peace and confidence in the administration of justice. But we ourselves are not deaf to the siren call of "repugnance." We do not come from a priestly caste, and we are not without our individual views, whether rooted in religious values, political commitments, or other ideological artifacts. What we do share – and must share – is a common commitment to the values of the profession. And this commitment must be sufficiently strong to engage the other values that we profess in a meaningful dialogue of introspection.[90]

> will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

Id.

88 SHELDON HARNICK, *Merry Minuet*, on HUNGRY I (Capitol Records 1959).

89 *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257-58 (Harvey C. Mansfield & Delba Winthrop eds. 2000) ("There is almost no political question in the United States that is not resolved sooner or later into a judicial question. Hence the obligation under which the parties find themselves in their daily polemics to borrow from the ideas and language of justice.").

90 Divisions in society undeniably run deep at the present time. *See, e.g.*, Marc Sandalow, *Schiavo's Fate in Judge's Hands*, S.F. CHRON., March 22, 2005, at A1 (reporting political scientist's comment that the divide in America "used to be principally economics," but today "is religious and racial"); David D. Kirkpatrick, *Conservative Gathering Is Mostly Quiet on Nominee*, N.Y. TIMES, August 15, 2005, at A13 (reporting on Congressman Tom DeLay's attack on judicial review and other aspects of "Justice Sunday"); *Justice Sunday Reloaded*, N.Y. TIMES, August 16, 2005, at A16 (commenting on "Justice Sunday" and divisions within conservative movement); David D. Kirkpatrick, *Battle Cry of Faithful Pits Believers Against Unbelievers*, N.Y. TIMES, Oct. 31, 2004, at A24 (commenting that "Rhetoric pitting the most observant against the least is

There is a third development that bears mentioning. During roughly the same time period, many private law firms have evolved from relatively small, true partnerships into large business entities employing hundreds and even thousands of people, across the country and around the world. In such entities, shared values are few, and scale makes it difficult to measure success in ways other than short-term profits – which come to signify success for the firm and the illusion of the good life for individual lawyers. When success comes to be defined in terms of profits per partner, the firm must become increasingly sophisticated about marketing, and, in particular, about distinguishing between those clients and potential clients it would like to represent and those it would like to avoid. In this new world, it becomes critical, from a marketing perspective, to determine whether a particular client or cause is likely to be "repugnant" not only to the members of the firm, but to its clients as well. In recent years, many corporations have become particularly progressive on two subjects: affirmative action and gay rights. Personally, I think this is a positive development, but I bring it up for a different reason. My point is this: As corporations have become more interested in these two issues, I suspect that many law firms have done so as well, both in terms of their own hiring and personnel policies and in terms of their pro bono commitments. And I suspect that the converse is also true: That many law firms give a wide berth to causes and clients with

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spreading beyond a core of white evangelical Protestants to other denominations, conservative Catholics, black and Hispanic Protestant churches and even some Jews," and noting one commentator's assertion that divisions in society are as deep as in the years before the Civil War); Harold Meyerson, *Democrats In a Divided Land*, WASH. POST, Nov. 5, 2004, at A25 ("In the reddest precincts of red America, Republicans question whether Kerry and the Democrats are Americans at all.").

On the other hand, the current emphasis on present divisions in society may miss the mark, as Danielle Allen has suggested:

> It is not the case that the United States has experienced a decline and fall from a period of prewar unity to a later stage of division .... The decisive thing is that those who were unassimilated had no mainstream public voice. The divisions within the citizenry were not given public articulation, and the dominant practice of citizenship among those who *had* melted together was to uphold the idea of being one people by ignoring or even undermining the citizen status of those who had not been assimilated. Citizenship taught habits of domination and acquiescence that, in conjunction, produced invisibility and a seeming oneness.

DANIELLE ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE BROWN V. BOARD OF EDUCATION 18 (2004) (emphasis in original). In Dean Allen's view, the teaching of such habits of domination and acquiescence is fundamentally inconsistent with the "real project of democracy[,] [which] is neither to perfect agreement nor to find some proxy for it, but to *maximize agreement while also attending to its dissonant remainders*: disagreement, disappointment, resentment, and all the other byproducts of political loss." *Id.* at 63 (emphasis in original). "A full democratic politics should seek not only agreement but also the democratic treatment of disagreement." *Id.* (footnote omitted). While "[t]he traditional method of achieving political majority depends on a fear of strangers," Dean Allen advocates the pursuit of "political friendship," which depends, critically, on "talking to strangers." *Id.* at 163 and 156-57.

which their more significant clients do *not* identify. In other words, I suspect that the preferences of significant clients, both real and perceived, positive and negative, have a significant impact on the decisions of firms to represent certain, but not other, pro bono clients.

These three points give me pause with respect to Professor Wolfram's treatment of "repugnance." But there is an additional point that also troubles me – his apparent lack of concern, and, indeed, his seeming approval – of the possibility that a "repugnant" client or cause may be "shunned" by all the lawyers in a community. Perhaps this point does not deserve extended treatment in light of the preceding discussion. But it troubles me that a community of lawyers could decide, for their own reasons, religious or otherwise, that advertisements for contraceptives, for the Catholic Church, or for some other product or entity are something that the community really did not need, and that they would decline to provide representation to anyone challenging the law or practice that was the basis for banning such advertisements.[91]

V.

I have focused on the problem of the repugnant client because I think that this problem underscores the point with which I started, namely, that the principal justification for the legal profession is to be found in the public purposes it serves. The legal profession, like the other professions, is part of what David Marquand, the British social scientist, has called the "public domain."[92] By that, he means "the domain of citizenship, equity and service whose integrity is essential to democratic governance and social well-being."[93] The public domain encompasses not only that part of social life that we generally call the pub-

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[91] Jackson, *supra* note 13, at 138-39. *See generally* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001).

[92] *See* DAVID MARQUAND, DECLINE OF THE PUBLIC 1 (2004). According to Professor Marquand, "the public domain should not be seen as a 'sector' at all." *Id.* at 27.

> It is best understood as a dimension of social life, with its own norms and decision rules, cutting across sectoral boundaries: as a set of activities, which can be (and historically have been) carried out by private individuals, private charities, and even private firms as well as public agencies. It is symbiotically linked to the notion of a public interest, in principle distinct from private interests; central to it are the values of citizenship, equity and service . . . . It is a space, protected from the adjacent market and private domains, where strangers encounter each other in the common life of the society – a space for forms of human flourishing which cannot be bought in the market-place or found in the tight-knit community of the clan or family or group of intimates.

Id.

Thus, "[t]o decide who and what belong to the public domain, . . . we have to look at providers as well as what they provide. Most of all, we have to look at the ethic or ethics that motivate providers, and at the institutions and practices which embody and transmit those ethics." *Id.* at 30.

[93] *Id.* at 1.

lic sector, but also those aspects of the private sphere that serve public, as well as private, purposes. Preeminent among these are the professions, and none more so than the legal profession.[94] According to Professor Marquand, "the public domain is both priceless and precarious."[95] He notes: "Its values and practices do not come naturally, and have to be learned. Whereas the private domain of love, friendship and personal connection and the market domain of buying and selling are the products of nature, the public domain depends on careful and continuing nurture."[96]

In the United Kingdom, Professor Marquand believes, the sense of the public has recently declined, and the notion of the public domain is in peril. The reasons he gives pertain in part to recent developments in that country's history,[97] but some of his observations also apply to the United States. I will men-

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94 According to Professor Marquand:

> The public domain as it developed and grew in the nineteenth and twentieth centuries was quintessentially the domain of . . . professionals. Professional pride, professional competence, professional duty, professional authority, and, not least, predictable professional career paths were of its essence. Professionals were the chief advocates of its growth; they managed most of its institutions, and they policed the frontier between it and the adjacent private and market domains. Above all, the values of the public domain were their values.

Id. at 53-54.

95 *Id.* at 2. In most places, and throughout history, there has been no "public domain," according to Professor Marquand. *Id.* at 32.

> [T]he public domain as we have known it in [England] was an essentially Victorian achievement – albeit one that the twentieth century built on extensively. The great work of the Victorian era was to carve out from the encircling market and private domains a distinct, self-conscious and vigorous public domain governed by non-market and non-private norms, and to erect barriers protecting it from incursions by its market and private neighbours.

Id. at 41.

96 *Id.* at 2.

97 Thus, Professor Marquand writes:

> When Shirley Letwin celebrated the "vigorous virtues," or Margaret Thatcher the "serious, sober virtues," they implied that market rationality was not enough: that rational economic agents ought to abide by a supra-rational moral code of some sort. But New Right virtues and the civic virtues of the public domain belonged to different moral universes. For the New Right, virtue went with independence, and independence with self-reliance . . . . For the neo-liberals, . . . talk [of an interdependent society] was humbug – a manifestation of middle-class guilt, an excuse for fecklessness and self-indulgence. True morality was private, not public; individual, not social. Virtuous individuals did good works, but they did them out of the goodness of their private hearts. They were not – and by definition could not be – bound to the beneficiaries by ties of mutual obligation. The very language of the public domain – a "public" conscience, "civic" virtue, the "collectivization" of risk – was implicitly immoral. The mentality behind it had to be rooted out.

Id. at 92.

tion only one of the factors to which he points. He calls this factor "the revenge of the private,"[98] meaning a "cry of protest against the hard, demanding, 'unnatural' austerities of public duty and public engagement in the name of authenticity and sincerity."[99] Among these austerities, of course, are the uncomfortable truths that the practice of law entails obligations as well as privileges, that these obligations extend beyond the realm of positive law and enforceable disciplinary rules, and that these obligations must be accorded the weight they deserve in the individual and common decisions we make as lawyers.

98 *Id.* at 79.

99 *Id.*